Jurisdictional Statement

Supreme Court, U.S.
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81-1785

Case Number

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

ERNEST A. HUNTER,

Appellant,

v.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

et al, Appellees.

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

APPELLEES
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President of New York State
Civil Service Commission
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Albany, New York 12239

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States;

Ernest A. Hunter, counsel pro se, the appellant herein, appeals from a final Order of the Court of Appeals of the State of New York denying the appellant's request to them for relief as follows:

Questions Involved on Appeal

Whether the Court below has construed the laws governing removals of state employees in such a manner as to allow for a denial of the appellant's rights as protected by the due process provisions of Article XIV, Section 1 of the Federal Constitution?

Whether the Court below has construed the laws governing the manner in which the examination was graded so as to allow for a denial of the appellant's rights as protected by the equal protection of the laws provision of Article XIV, Section 1 of the Federal Constitution?

Whether the Court below has construed the laws governing the removals of state employees in such a manner as to allow for a denial of the appellant's rights as protected by the due process provision of Article 1, Section 1 of the State Constitution and embraced in the due process provisions of the Federal Constitution?

Whether the Court below has construed the laws governing the manner in which the examination was graded so as to allow for a denial of the appellant's rights as protected by the equal protection of the laws provision of Article 1, Section 11 of the State Constitution and embraced in the equal protection of the laws provision of the Federal Constitution?

Whether the Court below has construed the laws governing the fitness of public employees by competitive examination in such a manner as to effectuate an abridgment of the appellant's constitutional rights as protected by the civil

service appointments and promotion provision of the State Constitution Article 5, Section 6 and embraced in the equal protection of the laws provision of the Federal Constitution?

Whether the Court below has construed the Statutory Laws [e.g., Article 4, Section 50(1) of the Civil Service Law] governing the fitness of public employees by competitive examination in such a manner as to effectuate an abridgment of the appellant's constitutional rights as protected by the equal protection of the laws provision of the Federal and State Constitutions?

Whether the Court below has construed the Statutory Laws [e.g., Article 5, Sections 81.7; 77; 75(1)(a)(2)(3) of the Civil Service Law] which govern the removal and restoration of state employees in such a manner as to preclude the appellant from an effective remedy in law or equity; thus, effectuating an abridgment of the appellant's constitutional rights as protected by the due process provisions of the Federal and State Constitutions?

Whether the Court below has construed the Statutory Laws [e.g., Article 5, Section 80(1)(6) of the Civil Service Law] which govern the reduction in grade in such a manner as to effectuate an abridgment of the appellant's constitutional rights as protected by the due process provisions of the Federal and State Constitutions?

Whether the Court below has construed the Statutory Laws [e.g., Article 2, Sections 217; 205 of the Civil Practice Law Rules] which govern the limitations of time provisions in such a manner as to preclude the appellant's constitutional rights to a fair and impartial hearing in law or equity on the merits; thus, denying him due process as protected by the provisions of the Federal and State Constitutions?

Whether the Court below has construed the Statutory Laws [e.g., Article 32, Section 3211(a)(5)(b) of the Civil Practice Law Rules] regarding the doctrine of res judicata

in such a manner as to preclude the appellant's constitutional rights to a fair and impartial hearing in law or equity on the merits; thus, denying him due process as protected by the provisions of the Federal and State Constitutions?

Whether the Court below has construed the Statutory Laws [e.g., Article 2, Section 17(3)(a) of the Public Officers Law] which govern exemplary damages against public employees in such a manner as to effectuate an abridgment of the appellant's constitutional rights as protected by the due process provisions of the Federal and State Constitutions?

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(v) Article 2, Section 17(3)(a) 3, 19

Proper Parties

The appellant requested disclosure pursuant to Article 31 of the Civil Practice Law Rules to discover the proper parties to be joined with the Appellees as noted herein.

Official and Unofficial Reports

This mater has not been reported officially or unofficially to the best of the appellant's knowledge.

Statement of the Grounds for Jurisdiction

(i) This proceeding was commenced under Articles 78 and 31 of the Civil Practice Law Rules, as the principles of equity are involved in such procedure, to attempt to arrive at a just solution to the problem. The appellant had requested the Court of first instance to order the Appellees to perform their job responsibilities pursuant to the laws of the State of New York.

(ii) The Court of Appeals of the State of New York entered an Order on the 16th Day of February, 1982, dismissing an appeal from an adverse ruling of the Appellate Division, First Judicial Department, affirming the Order/Judgment of Judge Richard Lee Price of the Supreme Court, Special Term, Part I, filed on the 23rd day of September, 1981, in the County Clerk's Office, New York County. The Notice of Appeal was filed by mail in the County Clerk's Office, New York County and the Court of Appeals, Albany, New York on the 3rd day of March, 1982.

(iii) The Supreme Court of the United States is requested to take cognizance of this appeal by virtue of the provisions of 28 USC 1257(2); alternatively, if the Supreme Court concludes that this cause will not lie as an appeal, then, a request is simultaneously made that a petition for a writ of certiorari, pursuant to the rules which obtain in 28 USC 1257(3) as is embraced in 28 USC 2103 of Chapter 133, shall issue to the Court of Appeals of the State of New York.

Constitutional Provisions and Statutes

1. Federal Constitution:

(a) Article XIV, Section 1: Citizenship rights not to be abridged by states: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." xxx.

2. Federal Statutes:

(b) 28 USC, Section 2103: Appeal from State court or from a United States court of appeals improvidently taken regarded as petition for writ of certiorari: "If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs."

(c) 28 USC, Section 1257(2)(3): State courts; appeal; certiorari: "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows": xxx "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of it being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

"For the purposes of this section, the term 'highest court of a State' includes the District of Columbia Court of Appeals."

3. State Constitution:

(d) Article 6, Section 3(b)(2): xxx "b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section; xxx In civil cases and proceedings as follows: xxx (2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court." xxx.

(e) Article 5, Section 6: Civil service appointments and promotions; xxx. "Appointments and promotions in the civil service of the state and all of the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive"; xxx.

(f) Article 1, Section 11: Equal protection of laws; xxx. "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." xxx.

(g) Article 1, Section 1: Rights and privileges secured; xxx. "No member of this state shall be disfranchised, or

deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers." xxx.

4. State Statutes: Civil Practice Law Rules:

(h) Article 78, Sections 7801; 7802(a); 7803(1)(2)(3); 7804(a)(b): 7801: Nature of proceeding. "Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article." xxx. 7802(a): Parties. (a) Definition of body or officer. "The expression 'body or officer' includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under this article." xxx. 7803: Questions raised. "The only questions that may be raised in a proceeding under this article are:

1. Whether the body or officer failed to perform a duty enjoined upon it by law; or

2. Whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. Whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed;" xxx.

7804: Procedure. (a) "Special proceeding. A proceeding under this article is a special proceeding.

(b) Where proceeding brought. A proceeding under this article shall be brought in the supreme court, special term, in the county specified in subdivision (b) of Section 506 except as that subdivision otherwise provides." xxx.

(i) Article 56, Section 5601(b)(2): Appeals to the court of appeals as of right. xxx. b. Constitutional grounds. "An appeal may be taken to the court of appeals as of right: xxx 2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States;" xxx.

(j) Article 32, Section 3211(a)(5)(b): Motion to dismiss: (a) Motion to dismiss cause of action. "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: xxx 5. the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds;" xxx. (b) Motion to dismiss defense. "A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit." xxx.

(k) Article 31, Section 3102(f): Method of obtaining disclosure xxx. (f) Action to which state is a party. "In an action to which the state is properly a party, whether as plaintiff, defendant or otherwise, disclosure by the state shall be available as if the state were a private person, except that it may be obtained only by order of the court in which the action is pending and except further that it may not include interrogatories or requests for admissions."

(l) Article 5, Section 506(b): Where special proceeding commenced xxx (b) Proceeding against body or officer. "A proceeding against a body or officer shall be commenced in any county within the judicial district where the respondent made the determination complained of or refused to perform the duty specifically enjoined upon him by law, or where the proceedings were brought or taken in the course of which the matter sought to be restrained originated, or where the material events otherwise took place, or where the principal office of the respondent is located." xxx.

(m) Article 2, Section 217: Proceeding against body or officer; four months. "Unless a shorter time is provided in the law authorizing the proceeding, a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner or the person whom he represents in law or in fact, or after the respondent's refusal, upon the demand of the petitioner or the person whom he represents, to perform its duty; or with leave of the court where the petitioner or the person whom he represents, at the time of such refusal, was under a disability specified in Section 208, within two years after such time."

(n) Article 2, Section 205(a): Termination of action: (a) New action by plaintiff. "If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if he dies, and the cause of action survives, his executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action." xxx.

(o) Article 1, Section 103(a)(c): Form of civil judicial proceedings: (a) One form of action. "There is only one form of civil action. The distinctions between actions at law and suits in equity, and the forms of those actions and suits, have been abolished." xxx. (c) Improper form. "If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution."

Civil Service Law; Rules and Regulations: (p) Article 5, Section 81(7): Preferred lists; certification and reinstatement therefrom xxx 7. "Notwithstanding any other provisions of this chapter, the civil service department or appro-

priate municipal commission may disqualify for reinstatement and remove from a prefered list the name of any eligible who is physically or mentally disabled for the performance of the duties of the position for which such list is established, or who has been guilty of such misconduct as would warrant his dismissal from the public service, except that a partially physically handicapped person, who is suspended pursuant to section eighty of this chapter because of lack of work, but who, within six months of the date of his suspension, is certified for reinstatement to any job item having the same physical requirements as the job item from which the person was suspended shall not be disqualified because of his physical handicap unless a medical examination discloses that because his handicap has become greater he would not be able to satisfactorily perform in such job item. No person shall be disqualified pursuant to this subdivision unless he is first given a written statement of the reasons therefor and an opportunity for a hearing at which such reasons shall be established by appropriate evidence, and at which such person may be represented by counsel and present evidence. The civil service department or municipal commission may designate a person to hold such hearing and report thereon."

(q) Article 5, Section 80(1)(6): Suspension or demotion upon the abolition or reduction of positions: 1. Suspension or demotion. "Where, because of economy, consolidation or abolition of functions, curtailment of activities or otherwise, positions in the competitive class are abolished or reduced in rank or salary grade, suspension or demotion, as the case may be, among incumbents holding the same or similar positions shall be made in the inverse order of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction in which such abolition or reduction of positions occurs, subject to the provisions of subdivision seven of section eighty-five of this chapter; provided, however, that the date of original appointment of any such incumbent who was

transferred to such governmental jurisdiction from another governmental jurisdiction upon the transfer of functions shall be the date of original appointment on a permanent basis in the classified service in the service of the governmental jurisdiction from which such transfer was made. Notwithstanding the provisions of this subdivision, however, upon the abolition or reduction of positions in the competitive class, incumbents holding the same or similar positions who have not completed their probationary service shall be suspended or demoted, as the case may be, before any permanent incumbents, and among such probationary employees the order of suspension or demotion shall be determined as if such employees were permanent incumbents." xxx. 6. Displacement in state service. "A permanent incumbent of a position in the state service in a specific title to which there is a direct line of promotion who is suspended or displaced pursuant to this section, together with all other such incumbents suspended or displaced at the same time, shall displace, in the inverse order of the order of suspension or demotion prescribed in subdivisions one and two of this section, incumbents serving in positions in the same layoff unit in the next lower occupied title in direct line of promotion who shall be displaced in the order of suspension or demotion prescribed in subdivisions one and two of this section; provided, however, that no incumbent shall displace any other incumbent having greater retention standing. If a permanent incumbent of a position in the state service is suspended or displaced from a position in a title for which there are no lower level occupied positions in direct line of promotion, he shall displace the incumbent with the least retention right pursuant to subdivisions one and two of this section who is serving in a position in the title in which the displacing incumbent last served on a permanent basis prior to service in one or more positions in the title from which he is suspended or displaced, if: (1) the service of the displacing incumbent while in such former title was satisfactory and (2) the position of the junior incumbent is in (a) the competitive

class, (b) the layoff unit from which the displacing incumbent was suspended or displaced, and (c) a lower salary grade than the position from which the displacing incumbent is suspended or displaced; provided, however, that no incumbent shall displace any other incumbent having greater retention standing. Refusal of appointment to a position afforded by this subdivision constitutes waiver of rights under this subdivision with respect to the suspension or displacement on account of which the refused appointment is afforded. The state civil service commission shall promulgate rules to implement this subdivision including rules which may provide adjunctive opportunities for displacement either to positions in direct line of promotion or to formerly held positions; provided, however, that no such rule shall permit an incumbent to displace any other incumbent having greater retention standing. For the purpose of acquiring preferred list rights, displacement pursuant to this subdivision is the equivalent of suspension or demotion pursuant to subdivision one of this section."

(r) Article 5, Section 77: Compensation of officers and employees reinstated by court order. "Any officer or employee who is removed from a position in the service of the state or of any civil division thereof in violation of the provisions of this chapter, and who thereafter is restored to such position by order of the supreme court, shall be entitled to receive and shall receive from the state or such civil division, as the case may be, the salary or compensation which he would have been entitled by law to have received in such position but for such unlawful removal, from the date of such unlawful removal to the date of such restoration, less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. Such officer or employee shall be entitled to a court order to enforce the payment of such salary or compensation. Such salary or compensation shall be subject to the provisions of sections four hundred seventy-four and four hundred seventy-five of the judiciary

law for services rendered, but otherwise shall be paid only directly to such officer or employee or his legal representatives."

(s) Article 5, Section 75(1)(a)(2)(3): Removal and other disciplinary action. 1. Removal and other disciplinary action. "A person described in paragraph (a), or paragraph (b), or paragraph (c), or paragraph (d) of this subdivision shall not be removed or otherwise subjected to any disciplinary penalty provided in this section except for incompetency or misconduct shown after a hearing upon stated charges pursuant to this section." (a) "A person holding a position by permanent appointment in the competitive class of the classified civil service," xxx. 2. Procedure. "A person against whom removal of other disciplinary action is proposed shall have written notice thereof and of the reasons therefor, shall be furnished a copy of the charges preferred against him and shall be allowed at least eight days for answering the same in writing. The hearing upon such charges shall be held by the officer or body having the power to remove the person against whom such charges are preferred, or by a deputy or other person designated by such officer or body in writing for that purpose. In case a deputy or other person is so designated, he shall, for the purpose of such hearing, be vested with all the powers of such officer or body and shall make a record of such hearing which shall, with his recommendations, be referred to such office or body for review and decision. The person or persons holding such hearing shall, upon the request of the person against whom charges are preferred, permit him to be represented by counsel, and shall allow him to summon witnesses in his behalf. The burden of proving incompetency or misconduct shall be upon the person alleging the same. Compliance with technical rules of evidence shall not be required."

3. Suspension pending determination of charges; penalties. "Pending the hearing and determination of charges of incompetency or misconduct, the officer or employee against

whom such charges have been preferred may be suspended without pay for a period not exceeding thirty days. If such officer or employee is found guilty of the charges, the penalty or punishment may consist of a reprimand, a fine not to exceed one hundred dollars to be deducted from the salary or wages of such officer or employee, suspension without pay for a period not exceeding two months, demotion in grade and title, or dismissal from the service; provided, however, that the time during which an officer or employee is suspended without pay may be considered as part of the penalty. If he is acquitted, he shall be restored to his position with full pay for the period of suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. If such officer or employee is found guilty, a copy of the charges, his written answer thereto, a transcript of the hearing, and the determination shall be filed in the office of the department or agency in which he has been employed, and a copy thereof shall be filed with the civil service commission having jurisdiction over such position. A copy of the transcript of the hearing shall, upon request of the officer or employee affected, be furnished to him without charge." xxx.

(t) Article 4, Section 50(1): Examinations generally. 1. Positions subject to competitive examinations. "The merit and fitness of applicants for positions which are classified in the competitive class shall be ascertained by such examinations as may be prescribed by the state civil service department or the municipal commission having jurisdiction." xxx.

(u) Part 55, Section 3: Pre-list review. "The director of examinations or his designee may, by appropriate notice, invite candidate review of and the submission of objections with respect to a tentative rating key for short-answer written tests constituting all or part of an examination for the purpose of enabling a committee on appeals to recom-

mend a final rating key which, upon approval by the commission, shall be applicable to all candidates. Such review may, but need not be limited to locations in Albany, Buffalo and New York City. The eligible list may be established pending consideration of the rating key by the commission, in which event objections to the tentative rating key filed by candidates shall constitute appeals to the commission. Every candidate shall be granted an opportunity to inspect his scored answer papers, or a photographic copy thereof, and the rating key and scoring tables in order to detect any errors in the application of such rating key to his answer sheet."

Public Officer Law. (v) Article 2, Section 17(3)(a): Defense and indemnification of state officers and employees xxx 3. (a) "The state shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court, or in the amount of any settlement of a claim, provided that the act or omission from which such judgment or settlement arose, occurred while the employee was acting within the scope of his public employment or duties; the duty to indemnify and save harmless prescribed by this subdivision shall not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee." xxx.

Statement of the Case

The appellant is a citizen of the United States and a resident of the State of New York, residing at 2816 8th Avenue, New York City 10039. He completed educational requirements for Bachelor of Science and Bachelor of Laws degrees at Florida Agricultural and Mechanical University. He has been a member of the New York State Employees' Retirement System since March 30, 1964, having transferred his membership from the New York City Retirement System. The appellant served in the Army of the United

States from January, 1952 until October, 1953. The appellant was employed by the State of New York as a permanent Narcotic Parole Officer March 30, 1970, in the competitive class. He was promoted to Senior Narcotic Parole Officer effective October 12, 1972. Due to deemphasis in drug programming, the appellant was reduced from Senior Narcotic Parole Officer, effective October 6, 1976, retroactive to August, 1976, to Narcotic Parole Officer; he was reduced from Narcotic Parole Officer to Drug Abuse Treatment Specialist I effective January, 1977.

The appellant on or about July 20, 1978, relieved himself from work at Manhattan Community Based Center due to loss of weight. He requested to be reinstated on or about December, 1978, after his weight had stabilized. Appellant was directed to take medical examinations during the month of January, 1979, before clearance could be had to actuate the procedure for his return. The appellant complied with those requests and subsequent requests to keep medical and other appointments. Please note that at all times, the appellant has averred his willingness to keep all appointments made pursuant to lawful current policy. After an inordinate delay, the appellant was advised officially by letter dated March 19, 1979, signed by Mr. John Debes, Personnel Administrator, that he had failed the medical examination given by Dr. Fleisher, Associate Physician of the Employee Health Service on January 9, 1979, and the psychiatric examination given on January 16, 1979, by Dr. Singer. The appellant has not to this date been given specific reasons for the determination reached to restrain him from his return to work. Dr. Francisco F. Merino examined the appellant February 14, 1980; his diagnosis was that the appellant had "Long Standing Schizophrenic Paranoid Reaction with elements of deterioration." The appellant since on or about March, 1979, when he received the correspondence from Mr. John Debes, had requested an official determination upon which he might appeal. On or about March 12, 1980, he received a Notice of Determination

advising him that his name would be removed from the Parole Officer's Preferred List because he had failed a psychiatric evaluation. The appellant has made many attempts to resolve the matter since being advised by the Civil Service Department of their determination to render him ineligible to be restored to the state's payroll.

The appellant took an examination on or about December, 1979, for Probation Program Consultant. An appeal was taken from a notice that he had failed the examination. The appellant received a reply dated June 24, 1980, indicating that his final score was 66. It had come to the attention of the appellant that one review group of the examination candidates had benefit of the examination questions and answers and their answer sheet with which they had an opportunity to rebut the State's established answer before the grading of the examination, whereas, the appellant was afforded only his answer sheet to compare with the established civil service answer sheet after the grading of the examination.

On May 22, 1980, the appellant filed a petition, under Articles 78 and 31 of the Civil Practice Law Rules, in the Supreme Court, Special Term, Part I, index number 10216/80, said petition, with its amendments, was dismissed without prejudice effective July 18, 1980, pursuant to a memorandum decision of Judge Kassal, granting a hearing to be held within 90 days pursuant to Section 81.7 of the Civil Service Law (as reported in the New York Law Journal, July 23, 1980, page 6, second column). It is parenthetically stated that to this date no hearing has been received by the appellant, however, he has received a reply from Mr. Robert Bazyk dated August 6, 1980, which gave him the opportunity to request a specific date for a hearing to be held at his request, even though the appellant had demanded no hearing, and a reply from Mr. Paul J. Vella dated October 7, 1980, which advised him if he did not request a hearing that it would be assumed that he had waived his rights to same. That his name would be perma-

nently removed from the preferred list for the position of Narcotic Parole Officer effective October 24, 1980. On or about July 30, 1980, the appellant appealed to the Appellate Division, motion number 3144, due to the adverse ruling of Judge Kassal; said appeal was dismissed by Associate Justice Sullivan, September 30, 1980, denying the motion for permission to appeal. On or about October 14, 1980, the appellant appealed to the Court of Appeals, motion number 1128; said appeal was dismissed November 11, 1980, by order of Chief Judge Cooke as subscribed by the Clerk of the Court, Joseph W. Bellacosa, as being untimely because the order appealed from was not final (as reported in 51 NY2d 910; 434 NYS2d 992; 415 NE2d 980, November 11, 1980). On or about February 6, 1981, the appellant petitioned for a writ of certiorari in the Supreme Court of the United States, docket number 80-1327, said petition was denied on or about March 23, 1981, by order subscribed by Alexander L. Stevas, clerk (as reported in 450 US 999, March 23, 1981). On or about April 18, 1981, the appellant filed a petition, under Articles 78 and 31 of the Civil Practice Law Rules, in the Supreme Court, Special Term, Part I, index number 7434/81; said petition was dismissed June 1, 1981, by Justice Beverly S. Cohen because service had not been effectuated. The appellant on or about June 10, 1981, petitioned the Supreme Court, Special Term, Part I, index number 12370/81, to compel the Appellees to (1) perform their job responsibilities; (2) restore appellant to state employment; (3) pay appellant the salary he would have earned had he not been illegally restrained from employment and damages he might have sustained as a result of these enumerated illegal acts; (4) grade the examination taken December 8, 1979, by the appellant in a manner consonant with the equal protection clauses of the Federal and State Constitutions; (5) provide the appellant with disclosure of proper parties; (6) provide the appellant with such other and further relief as the Court deemed proper in its wisdom. On or about June 30, 1981, the appellant filed a Reply to the Appellees motion to dismiss the petition and

affidavit in support thereof, as having no merit in fact. The Reply asserted that the limitation of time provision (i.e., Section 217 of the Civil Practice Law Rules) did not bar that proceeding and that the doctrine of res judicata could not apply in that instance because the issues involved had not been decided; that the Appellees had refused to provide a hearing according to law and the directive of the Court, pursuant to their job responsibilities. It was not the duty of the appellant to request hearings pursuant to these provisions but merely his duty to rebut the charges of incompetency which are a necessary concomitant thereof. The appellant has continually averred his willingness to comply with all lawful rules and keep all appointments. The acts of incompetency or dereliction of duty, upon which the Appellees relied to deny the appellant his constitutional right to return to the payroll of the State, have never been tendered to the appellant; and, a verified memorandum, which requested FACTORS FOR DISCLOSURE: (1) Whether appellant was wrongfully reduced in grade? (2) Whether Appellees should not be held accountable to the petitioner for their malfeasance in not restoring appellant to the payroll? (3) Whether Appellees acts or the acts of his agents were of such a willful and wanton criminal intent that the Appellees should be liable to the appellant for exemplary damages? (4) Whether Appellees acted in such a manner as to injure appellant by their malicious conduct, ill will and the reckless manner in which they applied (i.e., construed) the laws governing their job responsibilities? The verified memorandum requested relief as follows: (1) That appellant be restored to the state's payroll. (2) That appellant be assigned the highest grade from which he was unlawfully dismissed. (3) That the appellant be given benefit of all attendant rights as it relates to his restoration to payroll. (4) That the Court lift the veil to determine culpability of the Appellees in their individual capacities and as a unit. The petition, with its additional papers, was dismissed pursuant to Justice Price's Settle Judgment Order dated August 13, 1981, effective September 23, 1981, when

the Order/Judgment was filed. On or about October 9, 1981, the appellant appealed to the Appellate Division; the questions raised on appeal and responses of the Court below were: (1) Whether as a matter of Federal Constitutional Law, the acts of the Appellees, in denying the appellant the right to be restored to the state's payroll to the highest grade from which he was unlawfully reduced, effectuated an abridgment of the appellant's rights within the framework of the due process provisions of Article XIV, Section 1? *Answer (1):* The Court below determined in error, that the constitutional safeguards had been met by the Civil Service Department and by that Court. (2) Whether as a matter of Federal Constitutional Law, the acts of the Appellees, as they relate to the manner in which the examination was graded, effectuated an abridgment of the appellant's rights as protected by the equal protection of the laws provision of Article XIV, Section 1? *Answer (2):* The Court below, in dismissing the petition, did not address this issue. (3) Whether as a matter of State Constitutional Law, the acts of Appellees as described in question 1, effectuated an abridgment of those constitutional rights? *Answer (3):* The Court below determined in error, that the constitutional safeguards had been met by the Civil Service Department and by that Court. (4) Whether as a matter of State Constitutional Law, the acts of Appellees as described in question 2, effectuated an abridgment of those constitutional rights? *Answer (4):* The Court below did not address this issue. (5) Whether as a matter of State Statutory Law, the appellant should be restored to the state's payroll with back pay? *Answer (5):* The Court below determined in error that he should not be restored because the matter had been barred by the provisions of time limitations and that the matter had been previously decided by that Court, thus the doctrine of res judicata applied. (6) Whether as a matter of State Statutory Law, the appellant was wrongfully reduced in grade? *Answer (6):* The Court below did not address this issue. (7) Whether as a matter of State Statutory or Case Law,

should the Appellees be liable to the appellant for exemplary damages? *Answer (7):* The Court below did not address this issue. The concluding argument requested the following relief: (1) That the appellant be restored to the State's payroll. (2) That the appellant be assigned the highest grade from which he was unlawfully dismissed. (3) That the appellant be paid the salary he would have earned had he not been illegally restrained from employment and damages he might have sustained as a result of those enumerated illegal acts. (4) Determine that the examination taken December 8, 1979, be graded in a manner consonant with the equal protection clauses of the Federal and State Constitutions. (5) Provide the appellant with disclosure of proper parties. (6) Provide the appellant with such other and further relief as the Court deemed proper in its wisdom. The appeal was dismissed by Order of the Appellate Division approved by Joseph P. Sullivan, Justice Presiding, and subscribed by Joseph J. Lucchi, clerk, dated December 17, 1981; said Order affirmed the Order/Judgment of the Supreme Court issued by Richard Lee Price, Justice, without comment. On or about December 31, 1981, the appellant appealed to the Court of Appeals; the questions raised on appeal from the Appellate Division were: (1) Whether the Court below has construed the laws governing removals of state employees in such a manner as to allow for a denial of the appellant's rights as protected by the due process provisions of Article XIV, Section 1 of the Federal Constitution? (2) Whether the Court below has construed the laws governing the manner in which the examination was graded so as to allow for a denial of the appellant's rights as protected by the equal protection of the laws provision of Article XIV, Section 1 of the Federal Constitution? (3) Whether the Court below has construed the laws governing the removals of state employees in such a manner as to allow for a denial of the appellant's rights as protected by the due process provision of Article 1, Section 1 of the State Constitution? (4) Whether the Court below has construed the laws governing the manner in

which the examination was graded so as to allow for a denial of the appellant's rights as protected by the equal protection of the laws provision of Article 1, Section 11 of the State Constitution? (5) Whether the Court below has construed the Statutory Laws which govern the removal and restoration of state employees in such a manner as to effectuate an abridgment of the appellant's rights as protected by the due process provisions of the Federal and State Constitutions? (6) Whether the Court below has construed the Statutory Laws which govern the fitness of public employees by competitive examination in such a manner as to effectuate an abridgment of the appellant's rights as protected by the equal protection of the laws provision of the Federal and State Constitutions? (7) Whether the Court below has construed the Statutory Laws which govern the reduction in grade in such a manner as to effectuate an abridgment of the appellant's rights as protected by the due process provisions of the Federal and State Constitutions? (8) Whether the Court below has construed the Statutory Laws which govern exemplary damages against public employees in such a manner as to effectuate an abridgment of the appellant's rights as protected by the due process provisions of the Federal and State Constitutions? The concluding argument requested identical relief to that requested in the Appellate Division. This appeal was dismissed by a final decision of the Court of Appeals of the State of New York by its Order dated February 16, 1982, and subscribed by Joseph W. Bellacosa, Clerk of the Court.

Statement for Plenary Consideration

The appellant presents this cause to this Court for resolution in that the Courts of the State of New York have construed the laws in such a manner as to deny the appellant the right to liberty and property as protected by the due process and equal protection of the laws provisions of Article XIV, Section 1 of the Federal Constitution. It is the contention of the appellant that the laws of the State of

New York cannot effectuate a preclusion of rights guaranteed to the appellant by the Federal Constitution, in instances of this type. The Courts of the State of New York have interpreted the procedural laws (i.e., Article VI of the State Constitution; Article 56 of the Civil Practice Law Rules), which provide the vehicle for the resolution of the matter, in such a manner as to deny the appellant the very rights the Federal Constitution guarantees. There is no law of substance (i.e., Constitutional, Statutory, Case) known to the appellant which legally supports the final decision reached by the Courts of the State of New York.

Concluding Statement

Therefore, it is requested: (1) that the appellant be restored to the state's payroll. (2) That the appellant be assigned the highest grade from which he was unlawfully dismissed. (3) That the appellant be paid the salary he would have earned had he not been illegally restrained from employment and damages he might have sustained as a result of those enumerated illegal acts. (4) Determine that the examination taken December 8, 1979, be graded in a manner consonant with the equal protection clauses of the Federal and State Constitutions. (5) Provide the appellant with disclosure of proper parties. (6) Provide the appellant with such other and further relief as the Court deems proper in its wisdom.

Respectfully,

Appellees
Victor Bahou
President of New York State
Civil Service Commission
State Office Campus Building
Albany, New York 12239

New York City Office
of the Attorney General
2 World Trade Center
New York, New York 10047

Ernest A. Hunter
Appellant
Counsel pro se
2816 8th Avenue
New York, New York 10039
368-1732

Appendix

Appendix 9

9(a)

Index number 12370-82. Hunter *v.* New York State Department of Civil Service, et al, Supreme Court, Special Term, Part I,: "Upon the foregoing papers this Motions Nos. 129 and 213 of June 30, 1981 are consolidated for disposition.

This is an application by petitioner, pro se, pursuant to Article 78 for an order of mandamus, compelling respondent to reinstate petitioner to his former position to wit: Senior Narcotic Parole Officer. Respondent cross-moves pursuant to 3211(a)(5) to dismiss the proceeding.

Petitioner previously commenced a proceeding in 1980 in which he sought to be reinstated to his previous position as a Narcotic Parole Officer. The Court, per Kassal, J. granted the petition to the extent of directing respondent N. Y. State Dept. of Civil Service to schedule a hearing pursuant to §81.7 of the Civil Service Law. Petitioner did not seek to schedule a hearing, but appealed to the Appellate Division, the Court of Appeals and the U.S. Supreme Court which denied him leave to appeal.

This proceeding is clearly time barred by the statute of limitations pursuant to CPLR §217, and the doctrine of res judicata. Petitioner is seeking the same relief sought in the proceeding commenced in 1980, and granted by Kassal, J.

Accordingly, the application is denied and the petition is dismissed. Settle judgment."

9(b)

"Petitioner having moved this Court for a judgment restoring petitioner to State employment, with back pay, and punitive damages, and respondent New York State

Department of Civil Services having cross-moved pursuant to CPLR §3211(a)(5) to dismiss the proceeding and both applications having come on to be heard at a Special Term, Part I on the 30th day of June, 1981.

Now, on reading and filing the notice of petition and petition, and the exhibits annexed thereto, the notice of motion of respondent dated the 18th day of June, 1981, the affidavit thereto annexed of BARBARA B. BUTLER, ESQ., sworn to the 18th day of June, 1981, and the exhibits annexed thereto, the reply of petitioner ERNEST A. HUNTER dated the 23rd day of June, 1981 and the court having rendered a written decision, dated August 13, 1981.

Now, on motion of ROBERT ABRAMS, Attorney General of the State of New York, attorney for respondent, it is hereby

ORDERED, ADJUDGED AND DECREED that the application for a judgment restoring him to state employment with back pay, and punitive damages is denied and the petition dismissed."

9(c)

Index number 10216-80. HUNTER *v.* NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, et al, Supreme Court, Special Term, Part I, [reported in the New York Law Journal, July 23, 1980, page 6, second column] "The petition is granted to the following extent only:

The affidavit of respondent's attorney admits (and the attached Notice confirms) that the petitioner may have been erroneously advised to appeal the determination under Section 50.4 of the Civil Service Law rather than to request a hearing pursuant to Section 81.7 of the Civil Service Law. Although a subsequent letter to the petitioner did inform him of the correct remedy, he, nevertheless, elected to commence this proceeding in its stead.

The petitioner's March 19, 1980 letter should be treated as a timely election to pursue his right of review. That right of review, by way of a hearing under Section 81.7 of the Civil Service Law renders the determination challenged herein not a final determination. Accordingly, pursuant to CPLR 78(1), the petition must be dismissed as premature.

However, in the interests of justice and since the petitioner is appearing *pro se* and was previously misadvised by respondent, I am directing that the respondent settle a judgment dismissing the petition without prejudice and further directing that the respondent schedule a hearing within 90 days from this date, pursuant to Section 81.7 of the Civil Service Law on at least 15 days written notice to the petitioner. Settle judgment."

9(d)

Index number 12370-82. HUNTER *v.* NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, et al, Appellate Division, First Judicial Department, New York County:

"An appeal having been taken to this Court by the petitioner-appellant from an order and judgment (one paper) of the Supreme Court, New York County (Price, J.), entered on September 23, 1981, which denied petitioner's application for a judgment restoring him to state employment with back pay and punitive damages and granted respondent's motion to dismiss the petition and said appeal having been xxx by Mr. Ernest A. Hunter, appellant *pro se* and by Barbara B. Butler of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order and judgment so appealed from be and the same is hereby affirmed, without costs and without disbursements."

9(e)

Index number 12370-82, HUNTER *v.* NEW YORK STATE DEPARTMENT OF CIVIL SERVICE, et al, Court of Appeals, Albany, New York: "The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved."

FILED
3-8-82

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9(f)

NOTICE OF APPEAL

Case Number_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ERNEST A. HUNTER,

Appellant,

v.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

et al, Appellees.

Your Index Number: 12370/81

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

NOTICE OF APPEAL

Dear Sirs:

PLEASE TAKE NOTICE that an appeal is being taken from the Order issued on the 16th day of February, 1982, dismissing the appeal of the appellant to the Court of Appeals of the State of New York. The appeal had been taken to that Court due to the dismissal of the appellant's petition (pursuant to Articles 78 and 31 of Civil Practice Law Rules) by Judge Price's Order/Judgment filed on the 23rd

NOTICE OF APPEAL (Continued)

day of September, 1981, and affirmed by the Appellate Division of the First Judicial Department, without comment, upon the grounds that the cause was barred by the limitations of time provision and by the doctrine of res judicata. The appellant appeals from each and every part of the Order/Judgment of the Supreme Court, Special Term, Part I, and the subsequent Orders of the Appellate Division, First Judicial Department and the Court of Appeals of the State of New York affirming same.

This appeal is to be heard during the October Term, 1982, or as soon thereafter as the Supreme Court of the United States should decide pursuant to 28 USC 1257(2) or if this Court should conclude that an appeal should not lie; then, alternative relief is requested pursuant to the provision of 28 USC 1257(3), as embraced by section 2103 of Chapter 133 of 28 USC.

Respectfully,

ERNEST A. HUNTER
Appellant
Counsel pro se
2816 - 8th Avenue
New York, New York 10039
368-1732

9(g)

AFFIDAVIT OF SERVICE OF THE NOTICE OF APPEAL

Case Number_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ERNEST A. HUNTER,

Appellant,

v.

NEW YORK STATE DEPARTMENT OF CIVIL SERVICE,

et al, Appellees.

Your Index Number: 12370/81

APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

AFFIDAVIT OF SERVICE AND FILE

The appellant avers that he served upon and filed with the persons and bodies below listed by United States Postal Service first class postage, one copy filed with Courts as listed and three copies served upon Appellees, the NOTICE OF APPEAL and the Order of the Court of Appeals of the State of New York issued the 16th day of February, 1982, the Order/Judgment of the Supreme Court and the affirm-

AFFIDAVIT OF SERVICE AND FILE (Continued)

ing Order of the Appellate Division, on the 3rd day of March, 1982, pursuant to 28 USC Rule 28(5)(c):

Court of Appeals
Eagle Street
Albany, New York 12207

Supreme Court
Special Term, Part I
60 Foley Square
New York, New York 10007

Victor Bahou (Appellee)
President of New York State
Civil Service Commission
State Office Campus Building
Albany, New York 12239

New York City Office
of the Attorney General (Appellee)
2 World Trade Center
New York, New York 10047

Respectfully,

ERNEST A. HUNTER
Appellant
Counsel pro se
2816 - 8th Avenue
New York, New York 10039
368-1732

9(h)

AFFIDIVIT OF SERVICE OF THE JURISDICTIONAL STATEMENT

AFFIDAVIT OF SERVICE

The appellant avers that he served upon and filed with the persons and bodies below listed, by United States Postal Service first class postage, one copy filed with the Courts and three copies served upon the Appellees of the Jurisdictional Statement and Appended Appendix; on the 29th day of March, 1982, pursuant to 28 USC Rule 28(5)(c):

Respectfully,

COURT OF APPEALS
Eagle Street
Albany, New York 12207

SUPREME COURT
SPECIAL TERM, PART I
60 Foley Square
New York, New York 10007

VICTOR BAHOU (Appellee)
President of New York State
Civil Service Commission
State Office Campus Building
Albany, New York 12239

NEW YORK CITY OFFICE
OF THE ATTORNEY GENERAL (Appellee)
2 World Trade Center
New York, New York 10047

ERNEST A. HUNTER
Appellant
Counsel pro se
2816 8th Avenue
New York, New York 10039
368-1732